FATIMAH SIHI & ORS

v.

MEOR ATIQULRAHMAN ISHAK & ORS

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: N-01-76-1999]
11 DECEMBER 2004

ADMINISTRATIVE LAW: *Exercise of administrative powers - Domestic discipline - School children wearing headgear (serban) to public school - School principal expelling students for refusing to adhere to dress-code - Whether action of principal violated art. 11(1) Federal Constitution - Whether students' fundamental right of freedom of religion infringed - Whether wearing serban an essential and integral part of Islamic religion - Evidence and proof - Whether there was evidence before trial judge showing that wearing serban was an essential practice in Islam*

CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of religion - School children wearing headgear (serban) to public school - School principal expelling students for refusing to remove serban - Whether action of principal violated art. 11(1) Federal Constitution - Whether students' fundamental right of freedom of religion infringed - Whether wearing serban an essential and integral part of Islamic religion - Evidence and proof - Whether there was evidence before trial judge showing that wearing serban was an essential practice in Islam*

The plaintiffs were students of a public school ('the school'). They wanted to attend classes wearing a headgear (serban) but were disallowed from doing so by the principal of the school ('the 1st defendant'). The plaintiffs, however, were adamant, and following a dispute, the 1st defendant expelled them from the school on account of indiscipline. The plaintiffs then took out a writ against the 1st defendant, the Secretary General of the Ministry of Education ('the 2nd defendant') and the Government of Malaysia ('the 3rd defendant'), seeking to be restored as students of the school. The plaintiffs claimed that it was their religious right to wear a serban, and that the 1st defendant, in preventing then from entering the school whilst wearing a serban, had infringed on their fundamental right of freedom of religion as guaranteed under art. 11(1) of the Federal Constitution ('the Constitution'). The High Court found for the

plaintiffs and the defendants appealed. The central issue that fell for determination before the lords justices of appeal was whether the actions taken by the 1st defendant had violated the plaintiffs' "right to profess and practise" their religion (Islam) under art. 11(1) of the Constitution.

Held (allowing the defendants' appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1a] The pivotal question in the instant appeal was whether "the right to wear a serban is an integral part of the religion of Islam." It was a question of fact to be determined based purely on the relevant and admissible evidence placed before the court. (pp 259 g, 261 b & 262 a-b)

[1b] A certain practice may well be a religious practice and yet **not** an essential and integral part of the particular religion or the practices of the particular religion. It has to be decided with reference to the doctrines of the religion and the practices which are regarded by the particular community as part and parcel of the religion. (p 261 a, e & f-g)

[1c] There was **not** a shred of evidence before the learned judge to confirm that the wearing of a serban is mandatory in the religion of Islam and, therefore, an integral part of Islam. It would thus appear that the learned judge had acted more on his own intuition than on the evidence. This would render his decision vulnerable to appellate intervention and correction. (p 262 e-f)

[1d] It is only where observances as to dress, food, ceremonies and modes of worship – which are regarded as the integral parts of a religion – are denied by State action, that a complaint may properly be made under art. 11(1) of the Constitution. (p 263 b-c)

Per curiam:

[1] At common law, each educational institution is entitled to prescribe the appropriate uniform that is to be worn by its pupils. (p 262 g-h)

[2] Matters concerning the maintenance of discipline as well as the uniform of school children are best left to the Department of Education and to the individual school principals who will have to deal with the pupils on a day-to-day basis. The courts are ill-equipped to enter into such issues save where there is a clear duty to act fairly and that duty has been breached. (p 263 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif-plaintif adalah pelajar sebuah sekolah awam ('sekolah'). Mereka berhasrat untuk menghadiri kelas mereka dengan memakai penutup kepala ('serban') tetapi tidak dibenarkan berbuat demikian oleh pengetua sekolah ('defendan pertama'). Plaintif-plaintif, bagaimanapun, berkeras meneruskan hasrat mereka, dan ekoran suatu perselisihan, defendan pertama telah membuang mereka dari sekolah atas alasan tidak berdisiplin. Plaintif-plaintif memfail writ terhadap defendan pertama, Ketua Pengarah Kementerian Pendidikan ('defendan kedua') dan Kerajaan Malaysia ('defendan ketiga') memohon untuk kembali belajar di sekolah. Plaintif-plaintif menghujah bahawa adalah menjadi hak keugamaan mereka untuk memakai serban, dan bahawa defendan pertama, dalam menghalang mereka dari memasuki sekolah dengan berserban, telah melanggar hak asasi kebebasan berugama mereka sepertimana yang dijamin oleh per. 11(1) Perlembagaan Persekutuan ('Perlembagaan'). Mahkamah Tinggi membuat dapatan yang memihak kepada plaintif-plaintif dan defendan-defendan telah merayu. Isu utama yang meminta keputusan yang arif hakim-hakim rayuan adalah sama ada tindakan-tindakan yang diambil oleh defendan pertama telah melanggar hak plaintif-plaintif untuk untuk "menganut dan mengamalkan" ugama mereka (Islam) di bawah per. 11(1) Perlembagaan.

Diputuskan (membenarkan rayuan defendan-defendan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1a] Persoalan terpenting dalam rayuan semasa adalah sama ada "hak untuk memakai serban merupakan suatu bahagian penting ugama Islam". Ini adalah suatu persoalan fakta yang perlu diputuskan semata-mata dengan berdasarkan keterangan-keterangan yang relevan dan boleh diterimamasuk yang berada di hadapan mahkamah.

[1b] Sesuatu amalan mungkin menjadi amalan keugamaan, walaupun bukan merupakan suatu bahagian penting sesuatu ugama atau amalan ugama tersebut. Ia perlu diputuskan dengan merujuk kepada doktrin-doktrin ugama berkenaan serta amalan-amalan yang dianggap oleh komuniti berkaitan sebagai sebahagian daripada ugama.

[1c] Tidak terdapat sebarang keterangan di hadapan yang arif hakim yang boleh mengesahkan bahawa pemakaian serban adalah diwajibkan di dalam ugama Islam dan, dengan itu, suatu bahagian penting Islam. Tindakan yang arif hakim, dengan demikian, nampaknya lebih berasaskan kepada sangkaan daripada keterangan. Ini menjadikan keputusannya terbuka kepada campur tangan dan pembetulan di peringkat rayuan.

[1d] Hanyalah di dalam kes-kes di mana amalan-amalan mengenai pakaian, makanan, perayaan-perayaan dan cara beribadat – yang mana semua ini merupakan bahagian-bahagian penting sesuatu ugama – itu diketepikan oleh Kerajaan, maka bantahan boleh dibuat di bawah per. 11(1) Perlembagaan.

Per curiam

[1] Di sisi common law, sebuah institusi pelajaran adalah berhak untuk menentukan pakaian seragam yang sesuai untuk pelajar-pelajarnya.

[2] Adalah lebih baik untuk menyerahkan perkara-perkara mengenai penjagaan disiplin serta pakaian seragam kanak-kanak sekolah kepada Jabatan Pendidikan dan kepada pengetua-pengetua sekolah terbabit yang perlu berurusan dengan pelajar-pelajar pada setiap hari. Mahkamah-mahkamah tidak mempunyai keupayaan untuk mencampuri urusan-urusan sedemikian kecuali di dalam kes di mana wujud kewajipan jelas untuk bertindak dengan adil dan kewajipan itu telah dimungkiri.

Case(s) referred to:

Commissioner of Public v. Acharya Jagadishwaranada Avadhuta [2004] 2 LRI 39 ***(foll)***

Hjh Halimatussaadiah Hj Kamaruddin v. Public Services Commission Malaysia & Anor [1994] 3 CLJ 532 SC ***(refd)***

Javed v. State of Haryana AIR [2003] SC 3057 ***(foll)***

Sardar Syedna Taher Saifuddin Saheb v. State of Bombay AIR [1962] SC 853 ***(refd)***

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar AIR [1954] SC 282 ***(refd)***

Legislation referred to:

Federal Constitution, art. 11(1)

Constitution of India, arts. 25, 26

For the appellants - Abdul Rahim Uda SFC

For the respondents - Mohd Hanipa Maidin (Abdullah Abd Karim with him); M/s Mohamed Hanipa & Assoc

[Appeal from High Court, Seremban; Civil No: 22-13-98]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

A few words about the parties to this appeal and the dispute between them. The first appellant in this case is the principal of a school. It is the Sekolah Kebangsaan Serting (Felda). The second appellant is the Secretary General of the Ministry of Education. The third appellant is the Government of Malaysia. The school in question is a public school. It is under the control and administration of the third appellant. The respondents are all pupils at the school. They are Muslims. They wanted to come to school dressed in a serban which is a headgear not usually worn by Muslims in this country. The first appellant refused to permit the wearing of the serban. The respondents insisted. The principal had no choice. She acted in the only way open to her. She expelled the respondents. I think that she acted properly. And very sensibly. After all, it was a question of discipline.

The respondents were unhappy. They took out a writ against the appellants. They said that their fundamental right of freedom of religion guaranteed by art. 11(1) of the Federal Constitution had been infringed because they had been prevented from entering school wearing a serban which is part of their religious right. The judge agreed with them. He granted them the relief they sought, namely, their restoration as pupils of the school. This appeal is directed against that decision.

The main issue – and indeed the only issue canvassed before us – in this appeal is whether a constitutionally guaranteed right under art. 11(1) had been infringed by what the principal did. That article is in the following terms:

> Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.

For present purposes, the reference in the article to cl. (4) is not relevant. As I have already said, what is relevant is whether by refusing the respondents permission to attend school wearing a serban, the appellants had violated their "right to profess and practise" the religion of Islam. That would depend on whether the right to wear a serban is an integral part of the religion of Islam. This, in my judgment, is the correct test to apply whenever any person of any religion claims a violation of his art. 11(1) right. I am supported in the view I take by a number of authorities.

The first is *The Commissioner, Hindu Religious Endowments, Madras, v. Sri Lakshmindra Thirtha Swamiar* AIR [1954] SC 282 where the Supreme Court of India had to deal with art. 25 which is the Indian equipollent of our art. 11(1) and which confers on a person "freedom of conscience and free profession, practice and propagation of religion". K Mukherjea J who delivered the judgment of an unusually strong Constitution Bench of the Indian Supreme Court said:

> A religion undoubtedly has its basis in a system of belief or doctrines which is regarded by those who profess that religion as conductive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded **as integral parts of the religion,** and **these forms and observances might extend even to matters of food and dress.**
>
> The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Art. 25. Latham, CJ of the High Court of Australia while dealing with the provision of s. 116, Australian Constitution which inter alia forbids the Commonwealth to prohibit the 'free exercise of any religion' made the following weighty observations – *vide Adelaide Company v. The Commonwealth*, 67 CLR 116 at p. 127 (H):
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> > It is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious 'opinions', it nevertheless may deal as it pleases with any 'acts' which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s. 116. The Section refers in express terms to the 'exercise' of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the Section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. (emphasis added.)

In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, AIR [1962] SC 853, Das Gupta J when delivering judgment on behalf of himself and Sarkar and Mudholkar JJ enunciated the two principles governing arts. 25 and 26 of the Indian Constitution. He said:

> The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

I would merely pause to observe that Das Gupta J's second principle is based on a substratum of fact. It requires the court to determine as a fact based purely on relevant and admissible evidence placed before it as to whether the religious practice in question is an integral part of the particular religion.

The next authority is *Javed v. State of Haryana* AIR [2003] SC 3057, where RC Lahoti J (now Chief Justice of India), a most learned judge whose judgments are entitled to great respect, also laid down a similar test. His lordship said:

> The meaning of religion – the term as employed in Article 25 – and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in *Dr. M. Ismail Faruqui and others v. Union of India and Others* [1994] 6 SCC 360. The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. **A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.** (emphasis added.)

Very recently in *Commissioner of Police v. Acharya Jagadishwaranada Avadhuta* [2004] 2 LRI 39, AR Lakshmanan J (in a judgment delivered on 11 March 2004) said:

> It is only those practices which are integral part of religion that are protected. What would constitute an essential part of the religion or religious practice is to be determined with reference to the doctrine of a particular religion which includes practices which are regarded by the community as part and parcel of that religion. The test that has to be applied by the courts is whether a particular religious practice is regarded by the community practicing that particular practice as an integral part of the religion or not. It is also necessary to decide whether the particular practice is religious in character or not and whether the same can be regarded as an integral or essential part of religion which has to be decided based on evidence.

The question then arises as to whether the wearing of a serban is an integral part of the religion of Islam. This, as I have already said, is really a question of evidence and it was for the respondents to adduce sufficient relevant admissible material to prove that that is indeed the case. But there is no such evidence. In *Hajjah Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission Malaysia & Anor* [1994] 3 CLJ 532 the Supreme Court has held that the wearing of a purdah by a female Muslim was not an integral part of the religion of Islam. This is what Dzaiddin SCJ said:

> It is trite that art. 11(1) of the Constitution guarantees the freedom of religion, where every person has the right to profess and practise his religion. However, such right is not absolute as art. 11(5) provides that this article does not authorize any act contrary to any general law relating to public order, public health or morality. In the context of Service Circular 2 of 1985 prescribing the mode of dress and prohibiting the wearing of an attire covering the face by a lady officer in the public services during work, we are of the opinion that such prohibition does not affect her constitutional right to practise her religion. First, we accept the opinion of Dato' Mufti Wilayah Persekutuan that Islam as a religion does not prohibit a Muslim woman from wearing, nor requires her to wear a purdah.

It is pertinent to note that both in *Commissioner of Police v. Acharya Jagadishwaranada Avadhuta* and in *Hajjah Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission Malaysia & Anor* the court acted on evidence establishing a point of practice of a particular religion. In the present case, the only evidence is that of PW3, Ustaz Abdul Ghani bin Shamsuddin, who testified merely that it was permissible for a male Muslim to wear a serban. There was not a shred of evidence before the learned judge confirming that the wearing of a serban is mandatory in Islam and is therefore an integral part of Islam. Accordingly, the learned judge appears to have acted on his own intuition instead of on the evidence. His decision is therefore vulnerable to appellate correction.

That brings me to the point sought to be made by learned senior federal counsel about the power vested in the appellants to prescribe the appropriate dress code for school-going children under regulations passed for that purpose. I do not propose to go into this argument at any length as the only issue raised before us is that pertaining to the alleged infringement of art. 11. Suffice to say that even in the absence of any such regulations it is my judgment that at common law, every educational institution is entitled to prescribe the appropriate uniform that is to be worn by its pupils.

It is also my judgment that such matters as the appropriate uniform to be worn to school and the maintenance of discipline are best left to the Department of Education and to the individual school principal who has to deal with them on a daily basis. The court is ill-equipped to enter into such issues save where there is plainly a duty to act fairly and that duty is breached. Each case depends on its own facts and it is neither feasible nor desirable to attempt to lay down any fixed principle that is meant to govern all cases.

Where observances as to dress, food, ceremonies and modes of worship are regarded as integral parts of a religion, and these are denied by State action, then and then only can a complaint under art. 11(1) may legitimately be made. The present instance is not such a case. In my judgment, the appellants acted entirely in accordance with the Constitution and the relevant regulations in expelling the respondents. The learned judge was plainly wrong in holding otherwise.

For the reasons already given, this appeal was allowed at the conclusion of arguments on 22 November 2004 and those orders made that are usually made consequent upon a successful appeal.

My learned brothers Abdul Aziz bin Mohamad and Mohd Ghazali bin Mohd Yusoff, JJCA have seen this judgment in draft and have expressed their agreement with it.